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U.S. Citizenship and Immigration Services

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FILE: WAC 95 054 50266 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, revoked the nonimmigrant visa petition, and dismissed a subsequent Motion to Reopen or Reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

In the instant matter, the petitioner claims to be a manufacturer and seller of industrial containers and chassis. In 1994 the petitioner sought to employ the beneficiary temporarily in the United States as an assistant manager. The intracompany transferee L-1A visa was granted from December 24, 1994 to December 24, 1997. The Director, California Service Center issued a Notice of Intent to Revoke on July 22, 1999, based upon an investigative report received from the United States consulate in Seoul, Korea. The director issued a Notice of Revocation on March 21, 2000, based upon the petitioner's failure to rebut the proposed revocation within the allotted time period. On March 22, 2002, the director dismissed the petitioner's Motion to Reopen and Reconsider based upon its failure to file within 30 days of the revocation.

On appeal, counsel disagrees with the director's findings and asserts the petitioner timely responded to the director's Notice of Intent to Revoke, dated July 22, 1999. Counsel also contends the Motion to Reopen and Reconsider the director's decision to Revoke the 1994 petition was not untimely filed, in that neither the petitioner nor counsel received the director's Notice of Revocation, dated March 21, 2000.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the affected party must file the motion within 30 days of service of the unfavorable decision. If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The failure to file before this period expires may be excused at the discretion of the director where it is demonstrated that the delay was reasonable and beyond the control of the petitioner. 8 C.F.R. § 103.5(a)(1)(i).

In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a Citizenship and Immigration Services (CIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the motion shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

In the instant matter, the director issued a Notice of Intent to Revoke, dated July 22, 1999. The director subsequently issued a Notice of Revocation on March 21, 2000, based upon the petitioner's failure to rebut the grounds contained in the notice of intent. Although the petitioner submitted a copy of a US Postal Service Return Receipt, dated August 20, 1999, there is no evidence contained in the record to demonstrate that any rebuttal evidence or brief was received from the petitioner and stamp dated within the time allotted by the regulations. Furthermore, the copy of the brief in rebuttal to the Notice of Intent to Revoke the petition, which was submitted on motion to reopen, does not contain the signature of any legal representative.

Even if the AAO were to consider the rebuttal as timely filed, there would still be insufficient evidence to excuse the petitioner's untimely filing of its Motion to Reopen and Reconsider. In this matter, counsel has requested that the failure to file a timely motion in response to the director's revocation of the petition be excused. Counsel contends the Notice of Revocation was never received until such time as her Freedom of Information request was responded to by CIS. Counsel further contends that the motion was timely filed thereafter. Contrary to counsel's contentions, the petitioner has failed to show good cause for the delay in submitting the instant motion and attached exhibits untimely. There is nothing in the record to show notice to CIS of an address change on the part of the petitioner. Neither is there anything in the record to demonstrate that the Notice of Revocation sent to the petitioner and its representative had been returned to CIS, undelivered.

As a matter of discretion, the applicant's failure to file a timely rebuttal to the director's Notice of Intent to Revoke and the Motion to Reopen and Reconsider within the time period allowed, will not be excused as either reasonable or beyond the control of the applicant. Accordingly, the director's decisions will be affirmed and the appeal dismissed.

In the instant matter, even if the AAO were to consider the evidence and argument contained in the record, de novo, it is insufficient to establish that the beneficiary has been employed by Hyundai Precision & Industry Co., Ltd., or would be employed by the U.S. entity in a primarily managerial or executive capacity. *See Spencer Enterprises, Inc. v. United States,* 229 F.Supp.2nd 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS,* 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). Neither is the evidence or argument contained in the record sufficient to demonstrate the existence of a qualifying relationship between Hyundai Precision America, Inc. and Hyundai Precision & Industry Co., Ltd.

Under CIS regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B). In the instant matter, the director noted that based upon a review of the investigative report received from the consular office in Seoul, Korea, contradictory statements and documentation existed in the petition which brought into question the legitimacy of the beneficiary's status. The director questioned whether the duties performed by the beneficiary had been managerial in nature, and whether a subsidiary relationship existed between the U.S. entity and the beneficiary's foreign employer. Counsel contends the director failed to detail the grounds for revocation in violation of the regulation. Contrary to counsel's contention, the director's grounds for initiating the Notice of Intent to Revoke were clearly described and rightfully invoked.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The first issue in this proceeding is whether the evidence submitted is sufficient to establish that the beneficiary has been employed by the foreign employer in a primarily managerial or executive capacity. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily—

(i) Manages the organization, or a department, subdivision, function, or component of the organization;

(ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily—

(i) Directs the management of the organization or a major component or function of the organization;

(ii) Establishes the goals and policies of the organization, component, or function;

(iii) Exercises wide latitude in discretionary decision-making; and

(iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the present matter, there is insufficient evidence to establish that the beneficiary has been employed by the foreign entity primarily in a managerial or executive capacity for one continuous year within three years preceding the filing of the L-1A petition. In a letter of support of the petition, dated December 8, 1994, the petitioner stated that Hyundai Precision & Industry Co., Ltd had employed the beneficiary since August 1986, with no interruptions. The petitioner also stated that the beneficiary, for the past eight years, had worked for the foreign entity as an assistant manager in the aluminum container, production, and engineering department.

In the "Statement Declaration" written by the beneficiary, he stated that he traveled to Mexico and the United States on November 15, 1993, to "teach techniques of operating machines" that had been removed by Hyundai in Korea to "HYMEX" in Mexico. The beneficiary stated that he completed his assignment teaching operating machine techniques to a Mexican worker in May of 1994, and thereafter returned to Korea. The beneficiary further stated that due to a Mexican worker quitting his job, he was reassigned to Mexico to teach another worker. The beneficiary noted that he remained in the Mexico-United States area until December of 1994, when he again returned to Korea.

In the letter from the American Embassy Seoul, it is stated that the beneficiary trained Mexican machine operators from Hyundai de Mexico, located in Tijuana, Mexico.

In the brief in response to the notice of revocation, counsel stated that the beneficiary had been assigned by his foreign employer to go to Mexico in order to train local personnel in technology and manufacturing specifications.

Based upon a review of the evidence, the inconsistencies recognized by the director regarding the beneficiary's employment with the foreign entity have not been rebutted by the petitioner. For example, in the letter of support, the petitioner stated that the beneficiary had been employed by the foreign entity as an "assistant manager." While, on the other hand, both counsel and the beneficiary stated the beneficiary was sent to Mexico to "teach and train" local workers. Accordingly, CIS cannot determine whether the beneficiary has been acting in a primarily managerial capacity or in an operational capacity as a technical trainer. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner further stated that the beneficiary was currently in the United States in B-1 status. Contrary to the petitioner's statements, the beneficiary stated in his written statement declaration that he worked at "Hyundai de Mexico" teaching and training a Mexican worker to operate the machinery, and that he temporarily lived in a hotel in San Diego due to rising costs in Mexico. Further, the record demonstrates that the beneficiary was sent to the Mexican plant to train workers there to use machinery that had been shipped by the foreign entity. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho, supra.*

There is no evidence contained in the record to demonstrate, that as an "assistant manager," the beneficiary was responsible for directing the management of the organization, a division, or a function of the organization. Further, there has been no evidence submitted to show that the beneficiary supervised a subordinate staff of professional, managerial, or supervisory personnel who relieved the beneficiary from performing non-qualifying duties. Nor is there evidence to demonstrate that the beneficiary, as "assistant manager," exercised discretion over the day-to-day functions of the business. There is nothing in the record to show how much time the beneficiary spent performing managerial versus non-managerial duties. It appears from the record that the beneficiary performed rather than managed the day-to-day functions of the foreign company, in that he produced a product and/or provided a service. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). It also appears from the record that the beneficiary trained factory workers, rather than directed the management of the organization or subordinates. The actual duties themselves reveal the true nature of the

employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International, supra.* Overall, the evidence is insufficient to demonstrate that the beneficiary has been employed by the foreign entity in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

Further, the petitioner has failed to submit sufficient evidence to demonstrate that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity. In a letter of support of the petition, the petitioner described the beneficiary's proposed duties as:

> [The beneficiary] has been tentatively selected to assume the position of Assistant Manager for the Production Engineering Department at [redacted]. in San Diego. He will be responsible for testing all new products for quality assurance. His [sic] will oversee quality control for materials, production and act as liaison with engineers at the parent company to ensure quality assurance standards and technical specifications. [The beneficiary] will directly and indirectly manage approximately 60 employees including line leaders and supervisors, with authority to recommend personnel actions. He will be paid a monthly salary of approximately $2,500.00 during this temporary assignment.

In the statement declaration written by the beneficiary, he stated in part:

> Now, a skilled technical Mexican who was learned skill [sic] by me stoped [sic] working. There are many problem machinery and equipment in a plant of Mexico [sic]. HYMEX needs a hand to operate machine and teach techniques. So HYMEX calls for me to work again there. In this reason, [sic] I apply L-1 VISA.

In the response to the notice of intent to revoke, counsel stated that the beneficiary would have subordinate managers and others, who would be directly and indirectly involved with the Mexican and United States work site, reporting to him.

Based upon a review of the record, a discrepancy exists with regard to the beneficiary's proposed duties sufficient to invoke a notice of intent to revoke by the director in this matter. For example, the petitioner described the beneficiary's duties as an "assistant manager" to include managing approximately 60 employees including line leaders and supervisors, with authority to recommend personnel actions. However, the beneficiary inferred, in his statement declaration, that he would be "operating machinery" and "teaching techniques" to other plant workers. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho, supra.*

Although counsel stated that subordinate managers from the U.S. as well as the Mexican work site would be reporting to the beneficiary, it is difficult to determine from the record why a manager would report to an assistant manager in the scheme of things. Furthermore, there has been no independent documentary evidence submitted to substantiate counsel's claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). There is nothing in the record to

demonstrate that the beneficiary will be directing the management of the U.S. organization, department, or function therein. Nor is there any evidence in the record to show that the beneficiary will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. at 604. In this matter, it appears that the beneficiary would be primarily performing non-qualifying duties, rather than primarily performing managerial or executive tasks. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International, supra.* Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Another issue in this proceeding is whether a qualifying relationship exists between the U.S. entity and the beneficiary's foreign employer.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

> *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
>
> (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. §§ 214.2(l)(1)(ii) define, in pertinent part, "parent," "branch," "subsidiary," and "affiliate" as:

> (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
>
> (J) *Branch* means an operation division or office of the same organization housed in a different location.
>
> (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In the instant matter, there is insufficient evidence to demonstrate the existence of a qualifying relationship between the U.S. entity and the beneficiary's foreign employer. The U.S. petitioner is known as "[redacted]" and the foreign entity that employed the beneficiary is known as "[redacted] Ltd." The petitioner claims to be a subsidiary of [redacted] Ltd. In describing the business relationship, the petitioner stated in a letter of support, dated December 16, 1994, "[redacted] is a wholly-owned subsidiary of Hyundai Steel Industries, Inc. which in turn is a wholly-owned subsidiary of [redacted] Headquartered in South Korea." The petitioner, therefore, concludes that a qualifying relationship exists between the U.S. entity, which has proposed to employ the beneficiary, and the beneficiary's foreign employer. However, there is insufficient detail contained in the record to demonstrate the relationship between [redacted] Inc. and the beneficiary's foreign employer, or the relationship between the U.S. entity and the beneficiary's foreign employer. Contrary to the petitioner's assertions, the regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, *id.* at 595; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, *supra*. Accordingly, the appeal will be dismissed and the director's decision to revoke the petition will be sustained.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.